

In summarizing the similarities and differences between the proposed ordinance and the corresponding statute, the Court notes the two similarities: (1) both define the material prohibited by using tests that focus not on the prurient interest, patent offensiveness, and lack of serious values as determined by adults, but as determined by adults with respect to minors, and (2) the offenses are identical except for the substitution of the "harmful to minors" test for the statutory "obscene material to minors" test.

As for the differences, the proposed ordinance applies to everyone who has knowledge of the nature of the material and is not restricted to persons in charge of commercial establishments or newsstands. The proposed ordinance eliminates the exemption for persons acting in a capacity related to educational institutions, libraries, and museums who are acting in accordance with policies approved by the governing board of the institutions. It eliminates the exemption for nude exhibitions for bona fide scientific or medical purposes for bona fide schools, libraries, or museums. It eliminates the exemption for retail sales clerks who have no financial interest in the material or performance or in the establishment displaying or selling the material or performance. It eliminates the requirement for a warning prior to prosecution that the corresponding Statute contains at § 45-8-207. However, the proposed ordinance provides no penalty for violation.

A. Is the proposed ordinance overbroad and beyond the scope of § 45-8-201(5)?

The County argues that the proposed ordinance is overbroad and beyond the scope of § 45-8-201(5) on the basis that it seeks to restrict expressive materials that do not fall within the definition of obscenity codified at § 45-8-201. However, the corresponding statute likewise incorporates a definition of "obscene material to minors" that does not fall within the definition of obscenity codified at § 45-8-201. Both the proposed ordinance and the statute prohibit a much

broader spectrum of materials than does § 45-8-201 because both utilize definitions that adjust the standard test for obscenity from the viewpoint of the adult to the viewpoint of an adult with respect to a child, in accordance with Ginsberg.

However, the proposed ordinance has another problem. The statutory terms incorporated into § 45-8-206 are defined in § 45-8-205. The term "display or dissemination of obscene material to minors," defined at § 45-8-205(1), is the standard incorporated into § 45-8-206 to describe the offenses prohibited by § 45-8-206. This definition contains the following value prong qualification:

If the court finds that the material or performance has serious literary, scientific, artistic, or political value for a significant percentage of normal older minors, the material or performance may not be found to lack such value for the entire class of minors.

§ 45-8-205(1)(c). A county may adopt an ordinance pursuant to § 45-8-201(5) which makes the provisions of § 45-8-201 and 206 more restrictive as to obscenity. However, the terms used in § 45-8-206 that are defined in § 45-8-205 may not be made more restrictive—there is no statutory authority that allows a county to adopt an ordinance as to obscenity that is more restrictive than the provisions of § 45-8-205. By substituting a different standard-material that is "harmful to minors"—for the corresponding statutory standard of "display or dissemination of obscene material to minors," the proposed ordinance has exceeded the scope of § 45-8-201(5) by further restricting the definition in § 45-8-205(1). By eliminating the applicable statutory definition of "obscene material to minors" and the above value qualification codified at § 45-8-205(1) and substituting a more restrictive definition, the proposed ordinance impermissibly exceeds the scope of § 45-8-201(5) by amending a statute other than § 45-8-201 or § 45-8-206. Thus, on the

basis of statutory construction, the Court concludes that Section (1) of the proposed ordinance is invalid and illegal.

The severability clause in Section (5) provides that any invalidity of a section or provision of the ordinance shall not affect any other provision or application of the ordinance which can be given effect without the invalid section. Section (1) is invalid and must be severed from the ordinance. Because the impermissible and invalid definition in Section (1) is used to define the proposed ordinance's offenses set forth in Section (2), the Court concludes that Section (2) cannot be given effect. The proposed ordinance's use of the impermissible definition "harmful to minors" for material that is obscene is fatal to the Harmful to Minors ordinance. But because the ordinance provides no penalty for violation, a conclusion that the ordinance is illegal and invalid has no substantive effect.

B. Is the proposed ordinance unconstitutional?

The County argues that the proposed Harmful to Minors ordinance impermissibly burdens intrastate exercise of free expression, is unconstitutionally vague, and violates the First Amendment to the United States Constitution. Because the Court has already determined that the Harmful to Minors ordinance is illegal and invalid on the basis that it has impermissibly exceeded the scope of § 45-8-201(5), the County's remaining arguments are moot.

The County's motion should be granted as to the proposed Displaying or Disseminating Material Harmful to Minors ordinance.

CONCLUSION

The Court concludes that the proposed Obscenity ordinance, which is more restrictive than the corresponding state statute codified at § 45-8-201, restricts the distribution of obscene

material within the scope of § 45-8-201(5) and would not be invalid, illegal, or unconstitutional if enacted by the voters of Ravalli County. Accordingly, this portion of the County's motion for summary judgment should be denied.

The Court further concludes that the proposed Displaying or Disseminating Material Harmful to Minors ordinance, which is more restrictive than the corresponding state statute codified at § 45-8-206, restricts the distribution of obscene material beyond the scope of § 45-8-201(5) because it impermissibly changes the definitions codified at § 45-8-205. Therefore, the proposed Displaying or Disseminating Material Harmful to Minors ordinance would be invalid and illegal if enacted by the voters of Ravalli County. Accordingly, this portion of the County's motion for summary judgment should be granted.

ORDER

IT IS THEREFORE ORDERED that Plaintiff Ravalli County's *Motion for Summary Judgment* is hereby **DENIED** as to the proposed Obscenity ordinance.

IT IS FURTHER ORDERED that Plaintiff Ravalli County's Motion for Summary Judgment is hereby **GRANTED** as to the proposed Displaying or Disseminating Material Harmful to Minors ordinance.

DATED this 10th day of October, 2006.

Hon. Jeffrey H. Langton, District Judge